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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SEAN PAUL DELACERDA,

Defendant and Appellant.

G045659

(Super. Ct. No. 10NF1197)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Reversed and remanded for further proceedings.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Sean Paul Delacerda was accused by information with assault with a firearm (Pen. Code, § 245, subd. (a)(2); count 1),¹ kidnapping (§ 207, subd. (a); count 2), false imprisonment by violence (§ 236, 237, subd. (a); count 3), and misdemeanor domestic violence battery (§ 243, subd. (e)(1)). With respect to counts 1 and 3, it was alleged he personally used a firearm within the meaning of section 12022.5, subdivision (a). With respect to count 2, it was alleged he personally used a firearm within the meaning of section 12022.53, subdivision (b). A jury convicted Delacerda of all charges and found true all enhancement allegations.

The trial court selected count 2, the kidnapping conviction, as the principal term and imposed the low term of three years, plus 10 years for the related gun use enhancement. The court imposed a sentence of three years for assault with a firearm (count 1) and felony false imprisonment (count 3), plus 10 years each for personal use of a gun. Sentence on counts 1, 3, and count 4 were ordered to run concurrent with the term imposed for count 2, and stayed pursuant to section 654.²

Delacerda argues the trial court committed reversible error by denying his posttrial request to discharge retained counsel and have the court appoint the public defender. For reasons stated below, we agree and reverse the judgment. Once the case is remanded to the trial court, the court is directed to appoint new counsel, and the case shall proceed anew from the point Delacerda originally sought to discharge his attorney. (See *People v. Munoz* (2006) 138 Cal.App.4th 860, 870 (*Munoz*).)

Delacerda also challenges to the sufficiency of the evidence to support the kidnapping conviction and the court's failure to sua sponte modify the standard kidnapping jury instruction, and questions the trial court's selection of the upper term for

¹ All further statutory references are to the Penal Code unless otherwise stated.

² The abstract of judgment incorrectly reflects the imposition of an upper term on count 2. The sentencing range for kidnapping is three, five or eight years. (§ 208, subd. (a).)

count 3, the midterm for count 1, and the upper term for the firearm enhancements related to each. Our resolution of the discharge of counsel issue renders unnecessary our consideration of the remaining issues in this opinion. On remand, new counsel may pursue these points and any other meritorious issues by way of new trial motion or any other applicable posttrial procedures.

FACTS

The facts of the underlying crimes are not relevant to the decisive issue on appeal and we focus instead on the facts surrounding Delacerda's request to discharge retained counsel and appoint the public defender.

On April 20, 2010, Delacerda was arrested on a no-bail warrant and he has been in custody continuously since his arrest. The court appointed the public defender at his first appearance, but Delacerda appeared with retained counsel for arraignment on May 7. After a preliminary hearing, Delacerda entered pleas of not guilty and set the matter for jury trial to begin on August 11. Trial began on April 4, 2011. Closing argument started on April 13, 2011. The jury deliberated one day before rendering its verdict. The trial court set June 3, 2011 for sentencing.

On June 1, 2011, Delacerda filed a motion to continue the sentencing hearing and for a new trial based on alleged *Doyle*³ error. The motion to continue included an affidavit from defense counsel, stating, "I have been informed that my client is seeking new counsel and is requesting a continuance of the sentencing date for that purpose." The People opposed the motion to continue on grounds Delacerda's request was "merely a tactic to delay the sentencing hearing" and a violation of the victim's right to a speedy resolution of the case.

On June 3, the court acknowledged the pending motion for new trial and motion to continue sentencing but also indicated it needed time to consider the issues

³ *Doyle v. Ohio* (1976) 426 U.S. 610, 618.

raised by defendant's request for a continuance. The victim was present in court and the court gave her an opportunity to make a victim impact statement. She declined, indicating a preference to wait until the sentencing hearing. Defense counsel stated his client wished to discharge him and have the court appoint the public defender, but admitted he had not briefed the issue.

Although the court realized Delacerda was represented by retained counsel, a closed "quasi-Marsden" hearing was conducted at Delacerda's request. During this hearing, the court permitted Delacerda to express dissatisfaction at his attorney's representation. At the conclusion of the hearing, the court stated, "The court is mindful of the case of *People versus Ortiz*, 51 Cal.3d, 975 at page 983. It held that a criminal defendant who became indigent and wished to discharge retained counsel and request appointed counsel had the right to do that as long as the change in attorneys is timely. [¶] First, there is no claim before the court that Mr. Delacerda is indigent. [¶] Second, all of the claims that Mr. Delacerda has raised with respect to Mr. O'Connell all appear to be issues that deal with pretrial preparation and trial preparation. [¶] The court notes that this case was sent to it from Department C5, our master calendar, I believe either on April 1st or on Monday, April 4th. Looking at my own calendar, we began the 402 hearings in Mr. Delacerda's case on Monday, April the 4th. From 402 hearings through deliberations and verdict we were occupied with eight full court days. [¶] None of these issues were raised pretrial by Mr. Delacerda. None of them were raised during the trial. None of them were raised during the interim while the jury deliberated. None of them were raised post verdict when we set dates. [¶] Here we are today for a sentencing hearing two months later and now Mr. Delacerda is raising all of these issues with respect to his attorney, most or all of which could have been raised weeks or even months ago. The court does not find this to be a timely request."

The court then opened the hearing and told the prosecutor, "the court has found the request to be untimely; however, I do have a legal question for both counsel

and it is this: The case that I cited with respect to untimeliness was *People versus Ortiz* – the court cited the case of *People versus Ortiz*, 51 Cal.3d 975, that deals with a defendant who has retained counsel and asking to have retained counsel relieved and the public defender appointed being a general right of a defendant as long as it is timely. [¶] As I noted previously in finding it to be untimely, the court also notes that there was no claim of indigency for appointment of the public defender. [¶] The one area in which this court is unclear is whether Mr. Delacerda, at this point, has the absolute right to simply fire his attorney and proceed in pro per. I suspect the answer to that question is yes. The court is not going to be inclined to grant any further continuances on this case. If Mr. Delacerda wants to hire private counsel that can get up to speed on the case between now and July 22nd, that would also be an option available to him.”

Defendant’s counsel remarked that case law “made it pretty clear that the defendant does have a right to fire his retained counsel.” The court reiterated, “I think that is an absolute right. That is my understanding. He hasn’t told me that’s what he wants to do but my suggestion would be this, counsel: We’re coming back on motions on June 17th. My suggestion would be that we address that issue as well on the 17th and I’ll give both sides an opportunity to brief it further.” The court continued the sentencing to July 22, but also scheduled June 17 for further briefing and argument on Delacerda’s motion to discharge retained counsel.

On June 15, Delacerda filed a handwritten motion for substitution of counsel and a six-page declaration in support of the motion. The declaration provided a list of complaints about his attorney’s performance, and claimed counsel failed to provide transcripts of the preliminary hearing, pretrial hearings, and trial as requested. Delacerda explained his delay in making the motion as follows: “Your honor, I bring this to your attention now because I am housed near an inmate who is representing himself in pro per and he explained to me what effective representation means. So, I write this now to inform you that despite my profession, I did not understand the law or the standards of

effective representation until now.” He did not expressly request to proceed in propria persona, nor did he ask for the appointment of the public defender.

On June 17, the court, again at the request of Delacerda, conducted another closed “quasi-*Marsden*” hearing. The court cleared the courtroom and again listened to Delacerda’s complaints about his attorney’s representation. The court stated it now assumed Delacerda was indigent following the loss of his job and year-long incarceration. The court also understood Delacerda did not want to proceed in propria persona, but desired the appointment of the public defender. Nevertheless, the court stated “[defense counsel] properly represented Mr. Delacerda and will continue to do so. [¶] Quite frankly, Mr. Delacerda, in watching Mr. O’Connell’s very adept representation of your case, not just in his cross-examination of the people’s witnesses, but in watching his skillful argument and the defense presentation of the case, his performance in your case was so good that had the jury come back with a not guilty verdict, quite frankly, I would not have been surprised. [¶] That was the level of competence that I observed personally in Mr. O’Connell’s presentation from start to finish.” The court then tentatively denied Delacerda’s motion to discharge retained counsel.

When the courtroom was reopened, the court asked the district attorney for argument on Delacerda’s motion. The district attorney asserted the discharge of Delacerda’s attorney and the appointment of the public defender “would cause a substantial delay in the case because any attorney that comes in on this case in order to effectively represent Mr. Delacerda either in making any other motions or in representing him at the sentencing hearing, would have to go through the very extensive record that exists in this case from the beginning, all the way to the end.” On the other hand, the district attorney also stated, “the People aren’t opposed to anything as long as the sentencing hearing would not be continued past July 22nd.”

Defense counsel explained, “I think that what [the defendant has] described is almost a conflict situation between myself and himself. I understand the People’s

concerns about delaying the sentencing, but I haven't heard them really talk about whether or not they're going to be prejudiced if he has a new attorney who he can – who the defendant can be more cooperative with. [¶] In other words, if the case gets continued for six months so he can have a public defender, is it going to be the end of the world for the People on this case? Are they not going to be able to present a sentencing hearing in six months? I would submit to the court that whatever they planned to present on [July] 22nd they can present in six months if the court appoints counsel”

After considering the arguments of counsel, the court ruled as follows:

“The court makes the following findings: First, under *People vs. Ortiz*, 51 Cal.3d 975 at page 983, our California Supreme Court found that the right of a non-indigent criminal defendant to discharge his retained attorney with or without cause has long been recognized in this state and he may discharge retained counsel for any reason. [¶] *Ortiz* also held that ‘the right to discharge retained counsel is not, however, absolute. The trial court may deny a request to discharge retained counsel if it is not timely. That is, if it will result in a disruption of the orderly processes of justice.’ [¶] In considering the in camera hearing and also Mr. Delacerda’s written motion, in every one of his enumerated complaints about Mr. O’Connell, they appear to involve matters that involve pretrial preparation and strategy. [¶] From the time of defendant’s arraignment on the information, following his preliminary hearing, that is from the time he appeared in Department C5 on arraignment on the information, he appeared there no less than 13 different occasions for motions, pretrials and trial settings. [¶] The defendant never alleged in his motion that he raised any of these issues with the court on any of these 13 occasions. His matter was transferred to this court for his 14th appearance on April the 4th. Over the next eight court days, from 402 hearings to voir dire, opening statements, the presentation of evidence, closing arguments, just instructions, and a day of deliberations, the defendant again raised none of these concerns or issues. [¶] On April 14th, a jury rendered their guilty verdict. The defendant waived time for almost two

months for the preparation of a probation and sentencing report and to have his sentencing hearing on June 3rd. At no time during the two-month interim did Mr. Delacerda notify the court of any of these claims, nor did he raise any of these issues in the five-page handwritten statement that he personally prepared for his probation and sentencing hearing and was appended to his probation report. [¶] It was not until the formal date calendared for sentencing that Mr. Delacerda expressed his dissatisfaction with Mr. O'Connell and made his request for substitution. [¶] Had Mr. Delacerda raised any of these issues at any of his 21 previous court visits that occurred since his preliminary hearing, the court would have been able to address them in a timely manner and possibly and more than likely probably give Mr. Delacerda any appropriate relief he sought.”

Citing *People v. Rhines* (1982) 131 Cal.App.3d 498 and *People v. Keshishian* (2008) 162 Cal.App.4th 425, the court stated it was within its discretion to deny Delacerda's “last minute motion for a continuance so that retained counsel can be relieved and to secure new counsel under similar circumstances.” The court stated it “saw nothing in Mr. O'Connell's presentation before the jury that would call into question his level of competence or performance,” and further explained “the sentencing has now been continued to July 22nd, mostly to accommodate the court's upcoming vacation schedule. [¶] Although the prosecution did not object formally, [the prosecutor] did express either on the record or in chambers at our last date, which was scheduled for the formal sentencing, the extreme emotional trauma that the victim continues to suffer due to lack of closure on this case.” The court considered “it . . . [] highly unlikely, if at all possible, that between now and July 22nd a competent attorney would be able to step in, order a transcript of the proceedings, have a transcript delivered, absorb the transcript of the entire trial and go through the voluminous discovery and be able to be prepared to effectively represent Mr. Delacerda on July 22nd.” Furthermore, the court noted “these crimes occurred over 14 months ago. The victim appeared deeply traumatized during her

testimony before the jury. According to her statement included in the probation report, this crime continues to haunt and impact her life both emotionally and physically.” Ultimately, the court denied Delacerda’s motion to discharge retained counsel and appoint the public defender because to do otherwise “would impede the effective administration of justice”

DISCUSSION

On appeal, Delacerda contends his motion to discharge retained counsel and appoint the public defender was timely and the trial court committed reversible error in denying him the right to counsel of his choosing. We agree.

A criminal defendant’s constitutional right to counsel of his or her choice includes the right to discharge privately retained counsel at any time with or without cause – that is, without the showing of irreconcilable conflict or inadequate representation required before appointed counsel may be replaced under *People v. Marsden* (1970) 2 Cal.3d 118. (*People v. Ortiz* (1990) 51 Cal.3d 975, 980, fn. 1, 983 (*Ortiz*); *Munoz, supra*, 138 Cal.App.4th at p. 866. As the trial court noted, the right to discharge retained counsel, however, is not absolute. The trial court may deny such a motion if discharge will result in ““significant prejudice”” to the defendant, or if it will result in the ““disruption of the orderly processes of justice.”” (*Ortiz, supra*, 51 Cal.3d at p. 983; see also *People v. Gzikowski* (1982) 32 Cal.3d 580, 586-587.) The same standard applies to both pretrial and posttrial requests to discharge retained counsel. (*Munoz, supra*, 138 Cal.App.4th at p. 867 [trial court mistakenly assumed different standard applied posttrial].)

Although the trial court understood the difference between the discharge of retained counsel and the substitution of appointed counsel, it also referred to defense counsel’s commendable performance at trial (a fact relevant only in a true *Marsden* hearing) and, at Delacerda’s request, conducted two “quasi-*Marsden* hearings.” Moreover, the court’s delay estimate does not appear to be based on facts adduced during

the hearing. The court assumed the appointment of the public defender more than a month before the July 22 sentencing hearing would cause an unacceptable delay due to the time needed to prepare the record and become familiar with it. But here, as in *Munoz*, the court made a blanket generalization about that delay. (*Munoz, supra*, 138 Cal.App.4th at p. 870.) And, as Delacerda points out, the appellate record here was prepared in less than two months.

Furthermore, this case had not been unduly delayed by continuances, most likely because Delacerda was incarcerated throughout the proceedings. It was roughly a year from the commission of the crime to jury trial and verdict. However, this fact also calls into question an assumption the People and the court apparently made, i.e., Delacerda's request was nothing more than a delay of the inevitable. As his attorney noted, a delay of even six months to the sentencing hearing in no way benefitted Delacerda because he was already incarcerated. As in *Munoz, supra*, 138 Cal.App.4th 870, "[t]he record is devoid of even a suggestion defendant had an interest in delay"

The *Ortiz* court explained it this way, "'myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' [Citation.]" (*Ortiz, supra*, 51 Cal.3d at p. 984.) The ruling here wandered into this territory. As defense counsel pointed out, he and his client had reached an impasse at the filing of a motion for new trial and a sentencing brief. A motion for new trial may touch on trial counsel's performance, thus creating a genuine conflict of interest between counsel and client. This "fundamental dispute" alone would seem to militate in favor of counsel's discharge. (Cf. *People v. Stankewitz* (1982) 32 Cal.3d 80, 94.)

"In deciding whether the denial of a continuance was so arbitrary as to violate due process, the reviewing court looks to the circumstances of each case, "particularly in the reasons presented to the trial judge at the time the request [was]

denied.”” [Citations.]” (*People v. Courts* (1985) 37 Cal.3d 784, 791.) Delacerda essentially told the court he had lost faith in his attorney’s ability to adequately represent him. As this was the first time he sought to discharge his retained attorney, and the concerns he raised could affect the outcome of a new trial motion, “he should be treated no differently from a defendant who qualifies for representation by, and seeks appointment of, the public defender at the outset of the proceedings against him.” (*Munoz, supra*, 51 Cal.3d at p. 986.) The trial court erred by denying Delacerda’s posttrial request to discharge retained counsel and request the appointment of the public defender.⁴ Therefore, the judgment is reversed and the matter remanded for further proceedings.

DISPOSITION

The judgment and sentence are vacated and the trial court’s denial of Delacerda’s motion to discharge his retained counsel is reversed. The matter is remanded to allow the discharge of counsel and the appointment of the public defender. Once new counsel is appointed, the case shall proceed anew from the point Delacerda originally sought to discharge his attorney.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.

⁴ As noted on page 6, *ante*, the trial court made an express finding as to Delacerda’s indigence.